

SOUTH AFRICA / JUDGMENT

Modise v Minister of Police (1916/2017) [2023] ZANWHC 89 (22 June 2023)

[2023] ZANWHC 89

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid, Snyman

CASE / FILE NUMBER

1916/2017

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: 1916/2017

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional

Magistrates :YES/NO

In the matter between:-

ORAPELENG

MODISE

Plaintiff

and

MINISTER

OF POLICE

Defendant

JUDGMENT

FMM REID J (WAS SNYMAN)

Introduction:

- [1] The plaintiff claims from the defendant damages allegedly arising from a shooting incident in which the plaintiff was injured. The parties agreed to separate merits and quantum and the trial proceeded on the issue of merits alone.
- [2] On 24 April 2017 the plaintiff claims to have been shot by a member of the South African Police Services (SAPS) during protest actions in Lichtenburg, with a 9mm pistol bullet (a distinction is made between “live ammunition” and rubber bullets). The defendant admits that there were protest actions on that day, but deny that “live” ammunition was used. The two (2) witnesses for the defendant testified that only rubber bullets were used, despite the protest actions becoming violent.
- [3] It is the case of the defendant that the plaintiff was injured by another cause than live bullets originating from the SAPS. The evidence before court indicated that the members of public became violent and pelted the members of the SAPS with bricks and stones. The plaintiff and Mr Khumalo testified in support of the plaintiff’s case, and two members of the SAPS who were on duty on the relevant day testified on behalf of the defendant.
- [4] During the trial the plaintiff was represented by Adv K Maphwanya and the defendant was represented by Adv HJ Scholtz.
- [5] The following facts are common cause:
- 5.1.
- That members of the SAPS attended to protest action on 24 April 2017 at Lichtenburg.
- 5.2.
- That the protest action became violent. The evidence and photos before court indicated that the protest was violent to such an extent that an armoured vehicle of the SAPS was burnt to ashes.
- 5.3.
- That the members of the public were throwing stones and bricks at the members of the SAPS.
- 5.4.
- That the members of the SAPS attempted to control the protest by firing rubber bullets.
- 5.5.

That several of the members of the SAPS and members of the public had to be transported to the hospital for medical attention as a result of the violent protest.

5.6.

That the sound of gun-shots firing was heard, but the origin of that sound is not known.

5.7.

That the plaintiff did not open a criminal complaint against the SAPS for the alleged assault and injuries sustained during the protest.

5.8.

The plaintiff did not open a complaint at the Independent Police Investigation Division (IPID) against the SAPS.

5.9.

That the plaintiff has an abdominal wound but the nature or origin thereof is uncertain.

[6] The issues before court are the following:

6.1.

Whether the plaintiff has proven his case on a balance of probabilities; and

6.2.

In proving his case, whether the injury suffered by the plaintiff was at the hands of the defendant.

Onus

[7] In determining whether the plaintiff has acquitted the onus, the court has to have regards to the balance of probabilities before it.

[8] The plaintiff testified that he was shot with a live bullet and he referred to a medical report which indicated that a bullet was retrieved from the plaintiff's body. The author of the medical report was not called and the defendant disputed the authenticity of the medical report.

[9] The plaintiff did not provide a favourable impression on the court during his evidence. His evidence was contradictory in several material aspects. He initially testified that the bullet was

never retrieved, but "due to the gas" in his abdomen it did not damage the organs. His evidence in chief was that the bullet remained in his body. In cross-examination the plaintiff testified that the bullet was retrieved from his body by a doctor.

[10] It was put to the plaintiff during cross examination that he could have been injured by another member of the public, since his evidence was that he was standing in the front of the crowd facing the police officers. The plaintiff denied this and testified that he ran away when he was shot.

[11] It is argued on behalf of the plaintiff that:

“It is trite that every infringement of bodily integrity is prima facie unlawful and once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification. See: Noor Moghamat Isaacs v Centre Guards CC 2004 (1) All SA 221 (C).”

[12] On this argument, the plaintiff loses sight of the fact that the plaintiff is firstly to prove or establish that the plaintiff’s wound is indeed a bullet wound, and then that the bullet wound was sustained by a bullet from the SAPS.

[13] Road Accident Fund v Sauls 2002

(2) SA 55 (SCA) it was confirmed that there is no general 'public policy' limitation to the claim of a plaintiff for damages for the negligent causation of emotional shock and

resultant detectable psychiatric injury, other than a correct and careful application of the well-known requirements delictual

liability and of the onus of proof.

[14] In the matter Minister of Police v K 2020

(2) SACR 1 (SCA) the Supreme Court of Appeal confirmed that, where causation and negligence has not been established on the facts before court and on a balance of probabilities, the claim should be dismissed. It was held in paragraph [64] that:

“[64] To conclude, the findings by the High Court, that the elements of negligence, wrongfulness and causation were established, could not be supported by the evidence proffered on behalf of Ms K, and her claim should have been dismissed.”

[15] On the plaintiff’s own version, it cannot be certain that the bullet was fired by a member of the SAPS. If he had run away, his back would have been turned to the SAPS and he would not have been able to see who fired at him. In a similar vein, the plaintiff could have been shot by a member of the public as he was standing in the front of the crowd.

[16] The evidence of the plaintiff does not compute. He testified that the wound on his abdomen was sustained when (a) he was running away and (b) he was in the front of the crowd. On both these scenarios’ the wound would have been on the plaintiff’s back rather than on his abdomen.

[17] Having regard to the contradictions in the plaintiff’s evidence, and the probabilities that the wound could have been sustained by means other than at the hands of the SAPS, I cannot find that the plaintiff’s version is more probable than that of the defendant.

[18] I find that the plaintiff failed to prove his claim against the defendant on a balance of probabilities.

[19] In the premise, the plaintiff's claim is to be dismissed.

Costs

[20] The normal rule is that the successful party is entitled to his/her costs.

[21] No reason has been advanced why the successful party should not be reimbursed.

Order:

[22] In the premises I make the following order:

i) The plaintiffs claim is dismissed with costs.

FMM REID (WAS SNYMAN)

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING: 17 MARCH 2023

DATE OF JUDGMENT: 22 JUNE 2023

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1540/17/P5

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